Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ANNE ARUNDEL COUNTY, MARYLAND,

Petitioner,

v.

JOHN D. WEST, *et al.*,

Respondents,

UNITED STATES OF AMERICA,

Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

I. Whether the Fair Labor Standards Act's § 7(k) overtime exemption for public safety employees covers local government firefighters who perform emergency medical services, where Congress intended to exempt them, and the plain statement rule dictates exemption if the law is ambiguous?

II. Whether the Fair Labor Standards Amendments of 1974 compromise the Tenth Amendment and the Constitution's structural framework of dual sovereignty by (a) directing the functioning of state and local government public safety operations and (b) interfering with the provision of essential local emergency services?

LIST OF PARTIES

The Petitioner in this proceeding is Anne Arundel County, Maryland. Respondents are John D. West; Marianne C. Anderson; Michael C. Andresky; Susan L. Bailey; Brian L. Bond; Charles W. Boyer; Richard A. Brock; Daniel Brown; Anthony W. Burke, Sr.; Tracy L. Burke; Guy Steven Childers; Kim J. Cissna Ross; Riccardo Colella; Larry P. Collison; Michael Albert Connor; Michael E. Cox, Jr.; Timothy Crawford; Anita Y. Dunham; Michele Delalla; Grafton G. Dietz, Jr.; James H. Edwards, Jr.; Mara L. Eicens; Wayne Eisenhardt; Karen Estepp; Douglas G. Fishel, Jr.; Terry A. Gero; James L. Glime; James E. Goetz; Jeffrey P. Gormley; John Greene; Kathleen D. Grote; Russell Lloyd Harris; Sharon M. Henry; Michael William Herz; Lisa Ann Housand; Joseph M. Huber; William W. Isennock; Daniel L. Jarzynski; C. Edward Jett; Robert Frederick Johnson; Stephen E. Jones; Richard Allen Joy; Clifford C. Kooser II; James David Kruger; Douglas P. Marshall; Michael J. Marsiglia; William L. Merson; Timothy L. Mikules; Michael Steven Moore, Jr.; Greg A. Novak; George L. Pfeffer, Jr.; Noldon Pope; Mark Steven Praschak; Patrick O. Prendergast; Carol Ann Rabinowitz; Cynthia Ray Ell; Hurshel W. Shank, Jr.; Cecilia W. Sledgeski Warren; Gregory Lee Smith III; Randolph S. Spies; Thomas Stag; Peter G. Staley; Logan Starr, Sr.; Frank R. Stamm; David Sterling; Michael Swain; Keith D. Swindle; John Steven Thompson; Timothy Aldyn Tucker; Robert T. Vaccaro, Jr.; Robert Valderas; Marcus D. Wallace; William H. Ward; Khris Edwin Wildt; William Mark Wilhelm; David K. Williams; Raymond J. Schmidt; Kimberly S. Schneider; Michael Andrew Smith; John B. Wellman; Robert A. Harsh; Robert Anthony Mead; James Carroll Rostek, Sr.; Rand J. Lindgren; Raymond Gene Cullison, Jr.;

Dawn Rodriguez; David R. Klinger; William H. Phillips; Bruce E. Fritz; Charles Edward Yetter; R. Thomas Crow II; Debbie Schueler; William A. Cooper, Jr.; Steven K. Frye; Michael C. Huffman; Joseph M. Jordan; David James Geslois; Russell E. Davies, Jr.; Erick A. Esker; Donald Weigel; Ralph David Ritchie; Kenneth S. Banke; Jeannie Squillaci; Harry Joseph Joyave; Michael B. Ladd; William L. Bethea III; John E. Lamb; Daniel T. Woolston; Patrick J. Carmody; Clarence Gerard Hayes; Brett J. Howe; D. Depriest; John G. Alexander; Steven P. Ambrozowicz; Daniel F. Bowen; Claudia L. Clark; Susan E. Egan; Stephen Scott Feilinger; James Edward Harsh; Sarah Lefler; John Duffy McAnallen; Robert O'Brien; Michael F.X. O'Connell, Jr.; Anthony J. Pugliese; Edward Joseph Ross III; Randall W. Corbel; Kenneth T. Claypool; John A. Covington; John N. Dennett; George F. Dickey; Stephanie Sheinbach Dietz; Roland Fink, Jr.; Walter A. Ford, Jr.; Jeffrey L. Orye; Kenneth L. Pardoe; Keith A. Lefler; James L. Kidwell; Thomas A. Pezza; Noldon Pope; David A. Badwak; Douglas Bosley; Thomas R. Butler, Jr.; and Michael P. Henry. The United States of America is an Intervenor.

CORPORATE DISCLOSURE

Anne Arundel County, Maryland, is a body corporate and politic, organized under the laws of the State of Maryland and the Charter of Anne Arundel County, Maryland, and as such has no corporate parents or subsidiaries.

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Anne Arundel County, Maryland ("County"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *West v. Anne Arundel County, Md.*, 137 F.3d 752 (4th Cir. 1998), 135 Lab. Cas. P33,647, 4 Wage and Hour Cas. 2d (BNA) 641 (Feb. 18, 1998) (No. 96-1280, 96-1251). (App. 75a.) The opinions of the district court are unreported. (App. 1a and 18a.)

JURISDICTION

The court of appeals entered its judgment by opinion dated February 18, 1998 (App. 75a), and denied the County's Petition for Rehearing and Suggestion for Rehearing *En Banc* on May 13, 1998. (App. 100a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

29 U.S.C. §207(a)(1) (1994) provides:

> (a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. §207(k) (1994) provides:

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if –

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT OF THE CASE

A. The County And Its Fire Department

Anne Arundel County is a political subdivision of the State of Maryland, exercising powers of local government and home rule. *See* Md. Const. art. XI-A; Md. Ann. Code Art. 25A (1998); Anne Arundel County, Md., Charter, pmbl. and §101 (App. 111a). The County's Charter establishes the framework of its government, and requires the provision of typical local government services to citizens within its borders. At issue in this case is the operation of the County's Fire Department,[1] which provides fire suppression, fire prevention, fire training, fire communications, and emergency medical services. Anne Arundel County, Md., Charter, §547 (App. 111a).

As with most modern fire departments, the County Fire Department responds to a myriad of emergencies, including fires, accidents of all types, medical emergencies, hazardous materials situations and natural disasters, and its functions are necessarily dependent on the nature of the emergencies that arise. The majority of Fire Department responses, however, are related to the provision of emergency medical services. In order to provide efficient emergency response across the 416 square miles within the County's borders, the Department cross-trains all of its firefighters to perform rescue and emergency medical services.

The Department's operational structure is broken down into several "bureaus," including the Operations Bureau, comprising a suppression division and an emergency medical services division. Firefighters from both

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[1] The County funds the Fire Department with taxpayer dollars, and no fees are charged for emergency services.

divisions of the Bureau work on a "tour of duty"[2] basis, assigned in various combinations to 30 fire stations geographically located throughout the County, where they sleep, eat, handle miscellaneous fire station chores, and wait to be called to emergencies. All firefighters work the same shift schedules, co-respond to most types of emergency calls,[3] and are integrated into the same command structure.[4] The Fire Department's operational structure, and its ability to respond to whatever emergency situation occurs, is dependent on its use of cross-trained and interchangeable personnel.

B. The FLSA And The §207(k) Exemption

The Fair Labor Standards Act ("FLSA"), as originally enacted in 1938, was a depression-era measure intended to alleviate "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." Fair Labor Standards Act of 1938, ch. 676, §2, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §202). To accomplish this purpose, the 1938 Act, which applied

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[2] 29 C.F.R. §553.220 defines the term "tour of duty."

[3] EMS division personnel are automatically dispatched to all fires in the County except very small incidents, and they are also dispatched to all accidents, hazardous materials spills and rescues.

[4] The terms and conditions of firefighters' employment, including wages, hours and salaries, are negotiated and governed by union contract. In 1990, when this suit was filed, they worked 16-day cycles of 24 hours on duty, followed by 48 hours off duty, and worked an average of 52 hours per week, which included sleep and meal time. Currently, firefighters work an average of 48 hours per week.

only to private industry, ch. 676 §3(d), 52 Stat. 1060, provided for a mandatory minimum wage, and required employers to pay overtime after a specified number of hours at the rate of one-and-one-half times the employee's regular rate of pay.

Through the course of numerous amendments over the ensuing years, Congress gradually expanded the scope and complexity of the Act. In 1974, through legislation primarily directed at raising the minimum wage, Congress extended the Act's mandates to employees of state and local governments. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, §6(a)(1), 88 Stat. 55, 59 (1974) (codified at 29 U.S.C. §203(e)(2)(C)). Congress recognized, however, that the forty-hour workweek was intended for industrial and agricultural employees, and that public safety employees necessarily work on a "tour of duty" basis, which includes substantial time waiting to be called to an emergency. *See* H.R. Conf. Rep. No. 93-953, at 27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2864. Because of the unique hours and long waiting periods required in public safety work, *see Schmidt v. County of Prince William, Va.*, 929 F.2d 986, 990 (4th Cir. 1991), Congress enacted a partial exemption from the overtime requirements for employees of public law enforcement and fire protection agencies. §6(c)(1), 88 Stat. at 61 (codified at 29 U.S.C. §207(k)).[5]

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[5]Section 207(k) was created as a compromise between Senate Bill 2747, which contained only a limited phase-in of the FLSA's general overtime provisions for police and fire, and House Bill 12435, which contained a complete overtime exemption. H.R. Conf. Rep. No. 93-953, *supra*. The compromise resulted in the creation of a partial exemption, by raising the maximum hours standard (currently 212 hours in a 28-day "work period," 29 C.F.R. §553.230), and tying it to the flexible "tour of duty," rather than a mandatory seven-day workweek. *See id.*

Committee reports suggest that, in applying the FLSA to state and local governments, Congress acted on the belief that the law would have little effect on States and their local governments, provided an "overtime exemption [was] contained in the bill for police and firemen." H.R. Conf. Rep. No. 93-913, at 29 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2838. In its report, the House Committee on Education and Labor cited a nationwide survey conducted by the United States Department of Labor ("DOL"), finding that "wage levels for state and local government employees not covered by the FLSA are, on the average, substantially higher than those of workers already covered," and that state and local government employees seldom work more than forty hours per week, except those employees "in the public safety activity, which includes police and fire departments." *Id.* at 28, 29. Based on the DOL survey, and noting that the original bill contained a complete overtime exemption for "police and firemen," the House Committee reported that "the actual impact on state and local governments then, of a 40-hour standard, will be virtually non-existent." *Id.* at 29.

The House's view of the "non-existent" impact of the Amendments was not immediately tested; in 1976, this Court decided *National League of Cities v. Usery,* 426 U.S. 833, holding that the Amendments exceeded the powers granted to Congress under the commerce clause because they directly displaced the States' freedom to structure integral operations in areas of traditional governmental functions. Nine years later, however, in *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985), the Court abruptly reversed *National League,* concluding that the "traditional governmental functions"

test was "unworkable" and "inconsistent with established principles of federalism." *Garcia*, 469 U.S. at 531. Although the *Garcia* majority conceded that "the States unquestionably do 'retai[n] a significant measure of sovereign authority,' " quoting *EEOC v. Wyoming*, 460 U.S. 226, 269 (1983) (Powell, J., dissenting), it rationalized that the States could rely on the national political process to protect their constitutionally-mandated role in the federal system.[6] *Garcia*, 469 U.S. at 549. Four members of the *Garcia* Court strongly dissented, maintaining that the majority decision was violative of state sovereignty and inconsistent with the fundamental principles of our constitutional system. *Id.* at 557-89.

To alleviate the sudden turmoil created by *Garcia's* reversal of *National League*, Congress enacted the Fair Labor Standards Amendments of 1985, deferring temporarily the application of the FLSA overtime provisions, "so that state and local governments may make necessary adjustments in their work practices, staffing patterns, and fiscal priorities." S. Rep. No. 99-159, at 8, 15 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 655-56, 663.

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[6]Ironically, in touting the solicitude of Congress and the effectiveness of the "political process" to protect the interests of the States, *Garcia* pointed to the "special provisions concerning overtime pay for law enforcement and firefighting personnel [enacted by Congress] when it amended the FLSA in 1974 in order to take account of the special concerns of States and their localities with respect to these positions." *Garcia*, 469 U.S. at 554 n.17.

C. The Proceedings Below

Respondents John D. West and seventy-four other County firefighters[7] filed suit against the County in August 1990, alleging violations of the FLSA, 29 U.S.C. §§201-219 (1994), pursuant to 29 U.S.C. §216(b) and 28 U.S.C. §1337(a) (1994). Respondents claimed that the County violated the FLSA by compensating them for overtime hours in accordance with the law's partial exemption for fire protection and law enforcement employees under 29 U.S.C. §207(k) ("§7(k)"). Respondents argued that, because the bulk of their work relates to emergency medical response,[8] they are not covered by the §7(k) exemption, and that the County was therefore required to pay them as it paid its office and administrative employees, under the forty-hour maximum workweek standard of 29 U.S.C. §207(a).

The district court resolved this case on summary judgment motions. In June 1992, the court granted a partial summary judgment to Respondents, agreeing with their contention that the §7(k) exemption should be construed narrowly, and does not apply to emergency medical functions. (App. 1a.) Although the court acknowledged that Respondents met the four-part test defining fire protection employees set forth in DOL regulation 29 C.F.R. §553.210 (1997)[9] (App. 13a-15a), the court nonetheless

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[7] During the five years between the filing of suit and the Court's entry of judgment, 67 additional firefighters joined the action as plaintiffs, pursuant to 29 U.S.C. §216 (1994), for a total of 142 plaintiffs.

[8] Each Respondent had been assigned, at some time between 1987 and 1995, to the emergency medical services division of the Operations Bureau.

[9] 29 C.F.R. §553.210(a) defines "any employee . . . in fire protection activities" as an employee

[footnote continued]

found the §7(k) exemption inapplicable, based upon a narrow construction of the exemption, and a broad construction of the words "nonexempt work" as used in 29 C.F.R. §553.212 (1997).[10] In brief, the court determined that emergency medical response was "nonexempt work" under §553.212, and that Respondents, by virtue of their emergency medical functions, performed in excess of the twenty percent limit on nonexempt work. The court refused to consider whether Respondents fit within the "integral part" language set forth in §553.210, deciding that the language was essentially surplusage. (App. 11a-12a.)

> (1) employed by an organized fire department . . . (2) who has been trained to the extent required by [law] . . . (3) who has the legal authority and responsiblity to engage in the prevention, control or extinguishment of a fire . . . and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance [etc.] . . . The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215.

Section 553.215(a) provides that "ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated" as exempt if they have received rescue training and if they are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. (Both regulations are set out in full at App. 106a and 109a.)

[10] 29 C.F.R. §553.212(a) provides that "employees engaged in fire protection or law enforcement activities as described in §§553.210 . . . may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities," provided the "nonexempt work" does not exceed "20 percent of the total hours worked by that employee during the workweek or applicable work period." Section 553.212, which cites tree-planting by firefighters as an example of "nonexempt work," is set out in full at App. 108a.

In August 1995, the court issued summary judgment on the remaining issues in the case.[11] (App. 18a.) It issued its final judgment on January 18, 1996, awarding damages against the County in the amount of $2,907,-203.63, plus post-judgment interest. (App. 58a.)

Both parties appealed.[12] The court of appeals heard oral argument in July 1997, during which the panel posed questions to the parties regarding the ramifications of the recent decision of this Court in *Printz v. United States*, 117 S. Ct. 2365 (1997). The court subsequently ordered the parties to brief and argue the issue of the constitutionality of the FLSA as applied to this case, in light of *Printz* (App. 80a), and the United States then intervened. After hearing argument in December 1997, the court issued an opinion on February 18, 1998, affirming the district court's rejection of the FLSA's §7(k) exemption, and affirming the denial of liquidated damages, but reversing as to the applicability of the 29 U.S.C. §213(a) executive and administrative exemption for captains and lieutenants. (App. 75a.)

The court of appeals rejected the County's argument that *Garcia* was not controlling on the "critical" issue of the constitutionality of the FLSA as applied to the facts of this case, explaining that:

> we conclude both that *Garcia* controls the disposition of that issue and that any decision to revisit

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[11] On this Summary Judgment, the court again found in favor of Respondents, deciding that those Respondents who were lieutenants or captains did not qualify under the 29 U.S.C. §213-(a)(1) overtime exemptions for administrative and executive employees.

[12] Respondents appealed the imposition of a two-year, rather than a three-year, limitations period, and the court's denial of liquidated damages.

> *Garcia* is not ours to make . . . The Supreme Court's decision has been crystal clear: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." [citation omitted] That apparently is the situation here: *Garcia* is specifically on point; *Printz*'s contrary intimations are only generally instructive. We thus conclude on the authority of *Garcia* that the application of the FLSA to the Anne Arundel County Fire Department presents no constitutional defect.

West, 137 F.3d at 760. (App. 88a.)

The County filed a Petition for Rehearing and Suggestion for Rehearing *En Banc,* which was denied by the court of appeals on May 13, 1998 (App. 100a), and a Motion to Stay Issuance of the Mandate, which was denied by Order dated May 20, 1998. The County then filed an Application to Stay Enforcement and Execution of Judgment with this Court, which was granted by Chief Justice Rehnquist on June 9, 1998.

REASONS FOR GRANTING THE PETITION

This case involves the operation of a local government fire department and its ability to continue to provide emergency services under the strictures of the 1974 Amendments, as interpreted by the lower courts. It is a matter of critical importance to public safety services nationwide, as the majority of all fire department responses in the United States are related to the provision of emergency medical services. *See* M. Campbell, *et al., The National Run Survey 1997,* Firehouse, June 1998,

at 86, 92-96. If emergency medical response is considered "nonexempt" work, then most firefighters, and virtually all rescue and ambulance employees, will be excluded from coverage and subject to the Act's forty-hour maximum hours provision.[13]

No function is better suited to local oversight and control, and no function is more critical for the preservation of state and local governments, than the protection of lives and property. In this case, the lower courts interpreted the FLSA so as to remove that control, and to substitute differing maximum hours standards for emergency functions performed by firefighters, without regard for the impact of those mandates on local operations, or the needs of particular localities and their citizens. Moreover, the exemption at issue here has been repeatedly characterized as "ambiguous" by the courts, yet it is narrowly construed, resulting in a deprivation of local government autonomy that Congress very likely did not intend, and a result at odds with the plain statement rule applied in *Gregory v. Ashcroft*, 501 U.S. 452 (1991).[14]

The ambiguity of the §7(k) exemption is evident in the conflicting decisions of the lower courts, which have created uncertainty and confusion in the operation of public emergency services, and imposed enormous mone-

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[13] Under the traditional 24-hour "tour of duty" shift, just two shifts per week substantially exceeds the 40 hour limit.

[14] The plain statement rule outlined in *Gregory* provides that "the Court will not interpret a federal statute in a manner that would interfere with essential state or local government functions unless Congress plainly states its intention to do so in the statute itself." 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, §4.10(d) at 449 (2d ed. 1992).

tary liability upon state and local governments. While most courts acknowledge that public emergency medical service may be exempt work, the circuits are deeply divided over what test or tests should be used to determine exemption, how to determine which particular activities are exempt and which are nonexempt, and when 29 C.F.R. §553.212 ("80/20 rule") applies to deny the exemption.

This case presents an opportunity for the Court to clarify the confusion over §7(k) and its application to public safety emergency services. It also presents an opportunity for the Court to reexamine *Garcia*, which, as recognized by the Fourth Circuit below, "appears to rest on reasons rejected" in other opinions of this Court. (App. 88a.)

While the actual holding of *Garcia* was limited to determining that the FLSA could constitutionally be applied to a local government mass-transit system, *Garcia*'s theory that the "effectiveness of the federal political process" serves to "[ensure] that laws that unduly burden the States will not be promulgated," *Garcia*, 469 U.S. at 552, 556, has been widely adopted by the lower courts to foreclose any constitutional challenge to the FLSA, regardless of the State interests affected. *See, e.g., West*, 137 F.3d at 760 (App. 88a); *Reich v. New York*, 3 F.3d 581, 589 (2d Cir. 1993); *International Ass'n of Fire Fighters, Local 2203 v. West Adams County Fire Protection Dist.*, 877 F.2d 814, 820-21 (10th Cir. 1989).

The Court's post-*Garcia* opinions, however, demonstrate that federalism is not an antiquated maxim to be preserved only by the grace of Congress; rather, it is the underlying structure on which our constitutional system of government functions. These opinions indicate that the Court will not simply "[wash] its hands of all efforts

to protect the States," *Garcia,* 469 U.S. at 587 (O'Connor, J., dissenting), but will assume its responsibility "to say what the law is," *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803), when faced with Congressional action that compromises the structural framework of dual sovereignty.

For these compelling reasons, as more fully explained below, the Court should grant this Petition.

I.
THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND HEIGHTENS THE CONFUSION SURROUNDING THE §7(k) EXEMPTION.

The hallmark of the many lower court opinions interpreting the §7(k) exemption is the inconsistency in their reasoning and results, and the decision of the Fourth Circuit in this case serves only to fuel the disarray. Not only did the court fail to address the conflicts in the prior §7(k) decisions, it cited no case law in support of its determination of the issue. (App. 88a-91a.)

In their ongoing struggle to divine the meaning of the exemption, courts have looked to the DOL's regulations for guidance, resulting in a variety of suggested "tests" for exemption. The district court in the instant case, and in its companion opinion in *Nalley v. Mayor of Baltimore,* 796 F. Supp. 194, 198 (D. Md. 1992), concluded that the "integral part" language of 29 C.F.R. §553.210 had no independent meaning, and simply referred back to the four-part test stated earlier in the same regulation. The court further found that, despite §553.210(a)'s cryptic direction to "see 553.215," the latter regulation could not apply because its application

was specifically limited to employees of a public agency "other than a fire protection" agency.[15]

Taking the contrary approach, the Sixth and Seventh Circuits have decided that the "integral part" test must necessarily be interpreted by reference to §553.215's "substantially related test." *Alex v. City of Chicago*, 29 F.3d 1235, 1241 (7th Cir. 1994) (stating that "the regulations only state one test [§553.215] for the Sec. 7(k) exempt status of publicly employed emergency medical personnel"); *Justice v. Davidson County, Tenn.*, 4 F.3d 1387, 1395 (6th Cir. 1993) (applying §553.215 to define the integral part language of §553.210, but acknowledging that "the courts have not reached a single answer to this question").

The Eleventh Circuit came up with a completely different interpretation, deciding that the "integral part" test must be separate from the "substantially related" test. The court decided to "leave it to the district court" on remand, however, to define the distinction. *See Wouters v. Martin County, Fla.*, 9 F.3d 924, 931-32 (11th Cir. 1993).

It is unclear whether the Fourth Circuit applied any test in its opinion below, because it largely avoided the issue by relying on the 80/20 rule (20 C.F.R. §553.-212). In one sentence, the court tersely concluded that Respondents did not meet the integral part test. (App. 89a.) It then found that "medical services which are not rendered at the scene of any fire do not qualify as exempt activities," and, that, because Respondents spend more than twenty percent of their time on emergency

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[15]This reasoning results in a stricter test for exemption of fire department emergency medical responders than emergency medical responders employed by other public agencies.

medical response, they are not included within the exemption. (App. 90a-91a.)

The court's use of the 80/20 rule to deny the exemption, however, conflicts with the decision of the Eighth Circuit in *Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir.), *cert. denied*, 118 S. Ct. 5576 (1997), as well as the decision of the Fifth Circuit in *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991), which found emergency medical response to be exempt work. In *Christian*, the Eighth Circuit held that time spent by the plaintiff paramedics on "providing paramedic services on accident and medical emergency calls not stemming from a fire or car accident does not alter the nature of their duties or cause them to perform tasks unrelated to their jobs," and thus was not "nonexempt" work within the meaning of §553.212. *Christian*, 108 F.3d 934 (citing *Schmidt*, 929 F.2d at 990), and *Bond*, 939 F.2d 285.[16] The Fourth Circuit's decision in the case at bar also conflicts with *Bond*, where the Fifth Circuit found that the plaintiffs, who were single-role fire department emergency medical service employees, were covered by the §7(k) exemption, although they were not cross-trained as firefighters and performed no firefighting work.

Thus, firefighters who are cross-trained emergency medical services workers qualify for the exemption in the Eighth Circuit, and are not disqualified based on percentage of time spent rendering emergency medical service,

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[16]The lower court in *Christian* had determined that the plaintiff paramedics did not have the legal duty and responsibility to fight fires and did not perform activities concerned with fire suppression, and were therefore not employees in fire protection activities under §7(k) and 29 C.F.R. §553.210. *See* 108 F.3d at 932.

and single-role emergency medical service providers qualify for the exemption in the Fifth Circuit, even though they do not fight fires and are not trained or sworn as firefighters.

The Fourth Circuit's decision to withhold the exemption as to those public safety employees who meet the four-part test of 29 C.F.R. §553.210, but do not spend eighty percent of their time at fire scenes, is at odds with the exemption's intent and the realities of emergency response service. Conversely, the decisions of the Fifth and Eighth Circuits implement Congress's intent to exclude from the general overtime standard firefighters who perform emergency medical service work, and permit overtime to be paid on the "tour of duty" standard that is necessary for the performance of emergency services. This Court should grant certiorari in this case, to clarify the applicability of the §7(k) exemption to these important public safety services.

II.

CONGRESS INTENDED TO INCLUDE LOCAL GOVERNMENT FIREFIGHTERS WHO PERFORM EMERGENCY MEDICAL FUNCTIONS WITHIN THE FLSA'S §7(k) EXEMPTION, AND, IF THE EXEMPTION IS DEEMED TO BE AMBIGUOUS, THE PLAIN STATEMENT RULE COMPELS EXEMPTION.

In *Garcia*, there was no question that Congress intended to apply the FLSA to the mass transit operation at issue, and no contention that transit employees were included within any exemption to the Act. This case presents a different question, however, because it involves an interpretation of an exemption to the FLSA, by which Congress intended to exclude public safety employees such as the respondents in this case. *See Pennsylvania Dept. of Corrections v. Yeskey*, 118 S. Ct. 1952, 1954 (1998).

Further, even if the Court believes Congress's intent is ambiguous, the plain statement rule set forth in *Gregory* compels application of the exemption.[17]

The legislative history culminating in the enactment of §7(k) demonstrates Congress's intent to exclude public ambulance and rescue employees from the general forty-hour overtime standard. In the reports of the legislative committees that reviewed the proposed 1974 Amendments, and the statements of the legislative leaders who were part of the joint House-Senate Conference Committee that developed the §7(k) "tour of duty" concept, the exemption was referenced interchangeably as applying to "policemen and firemen," employees in "firefighting or law enforcement activities" and to "public safety employees." H.R. Rep. No. 93-913, *supra*, at 11, 27, 29; H.R. Conf. Rep. No. 93-953, *supra*, at 26, 27; 120 Cong. Rec. 7310, 7317, 8598, 8599 (1974).

From the floor of the House, legislative leaders recognized the exemption's "tremendous importance" to local governments and the "phenomenal increase" in costs that would be imposed on local governments and their taxpayers without it, and gave explanations and assurances that public agency employees engaged in "rescue-ambulance services"[18] would be covered by the exemption. 120

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[17] In *Gregory*, this Court found that the Age Discrimination in Employment Act ("ADEA"), despite its broad definition of the word "employee," did not apply to state judges, reasoning that "[w]e will not read the ADEA to cover state judges unless Congress has made it clear that judges are included . . . it must be plain to anyone reading the Act that it covers judges." 501 U.S. at 467.

[18] While emergency medical response has long been a component of the fire service, terms such as "paramedic" were not in common use at the time the 1974 Amendments were considered and enacted. *See* Nancy L. Caroline, *Emergency Care in the Streets*,

[footnote continued]

Cong. Rec. at 7317, 7318; 120 Cong. Rec. at 8598. Based on the legislative history, most courts have concluded that ambulance and rescue service personnel could fall within the scope of the terms used in §7(k). *Christian*, 108 F.3d at 934 (citing *Alex*, 29 F.3d at 1239; *Justice*, 4 F.3d at 1392-93; *O'Neal v. Barrow County Bd. of Comm'rs*, 980 F.2d 674, 677 (11th Cir. 1993); and *Bond*, 939 F.2d at 288).

Notwithstanding the evidence of Congress's intent, however, many courts have refused to apply the exemption, citing its ambiguity, and applying hornbook rules of statutory construction. *See Alex*, 29 F.3d at 1239; *Justice*, 4 F.3d at 1392-93; *Horan v. King County Div. of Emergency Med. Services*, 740 F. Supp. 1471, 1476-77 (W.D. Wash. 1990). For example, the Fourth Circuit recently said:

> [t]he Supreme Court has directed that the [FLSA] must be construed "liberally to apply to the furthest reaches consistent with congressional direction." *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 296 (1985). For this reason, all "[e]xemptions from or exceptions to the Act's requirements," including the §7(k) exemption, "are to be *narrowly construed against the employer asserting them.*"

Roy v. County of Lexington, 141 F.3d 533, 540 (4th Cir. 1998) (quoting *Monahan v. County of Chesterfield*, 95 F.3d 1263, 1267 (4th Cir. 1996), quoting *Johnson v. City of Columbia*, 949 F.2d 127, 129-30 (4th Cir. 1991)) (emphasis added in *Roy*); *see also* App. 4a.

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at 5 (4th ed. 1991) (stating that the U.S. Department of Transportation issued the first set of national standards and guidelines for paramedic training in 1976).

This mode of construction, which was adopted when the FLSA applied only to private employers, *see, e.g., Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), has been parroted repeatedly, without regard for the different considerations involved when principles of federalism are implicated. In cases involving application of FLSA exemptions to state and local government operations, it reverses the proper inquiry; by construing the FLSA expansively and the §7(k) exemption narrowly, courts ignore *Gregory* and effectively eliminate the exemption that Congress intended.

Where Congress desires to interfere with traditional and essential state functions, such as decisions regarding the hours, wages and functions of local public safety employees, and thus alter the "usual constitutional balance between the States and the Federal Government" it is crucial that it make its intention "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460-61 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) and citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984)). Therefore, if the §7(k) exemption is ambiguous, it should be interpreted to include Respondents in this case, so as to preserve, rather than destroy, the County's power to operate its fire department. *See Yeskey*, 118 S. Ct. at 1953-54, *citing Gregory*, 501 U.S. at 460-61.

Under the rationale of *Garcia*, state sovereignty must rely on the federal political process, which "ensures that laws that unduly burden the States will not be promulgated." *Garcia*, 469 U.S. at 556. The political process cannot fulfill that role, however, if vital aspects of local government operations are ceded to the federal government based on ambiguous legislation.

III.

THE FAIR LABOR STANDARDS AMENDMENTS OF 1974 ARE UNCONSTITUTIONAL AS APPLIED IN THIS CASE, AND *GARCIA*'S "POLITICAL PROCESS" RATIONALE DOES NOT FORECLOSE CONSTITUTIONAL CHALLENGE.

Every American schoolchild learns that the Framers of our Constitution divided governmental powers between the national government and the individual States, creating a system of dual sovereignty. *Gregory*, 501 U.S. at 457 (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). This division of power was intended not as a housekeeping measure, but as a means to diffuse government authority and thus secure liberty to the people of the United States:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.

The Federalist No. 51, at 323 (J. Madison) (C. Rossiter ed. 1961). *See also Clinton v. New York*, 118 S. Ct. 2091, 2108-10 (1998) (Kennedy, J., concurring); *Printz*, 117 S. Ct. at 2378 (stating that separation of powers "is one of the Constitution's structural protections of liberty"); *New York v. United States*, 505 U.S. 144, 182 (1992) (citing *Coleman v. Thompson*, 501 U.S. 722, 759 (1991), and *Gregory*, 501 U.S. at 458).

The Constitution delegates specific powers to the federal government, and leaves all remaining powers to the States, preserving the States' "residuary and inviolable sovereignty" in those areas that were traditionally of local concern and better suited to resolution locally. *The Federalist* No. 39, at 245 (J. Madison) (C. Rossiter ed.

1961); *see* U.S. Const., art. I §8; U.S. Const., art. IV §4; U.S. Const. Amend. X. Although this reliance on the principle of dual sovereignty was "the unique contribution of the Framers to political science and political theory," the judiciary's role in interpreting and enforcing constitutional federalism remains uncertain. *United States v. Lopez*, 514 U.S. 549, 576 (1995). As Justice Kennedy noted in his concurring opinion:

> [o] f the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the judiciary to play a significant role in maintaining the design contemplated by the Framers.

Lopez, 514 U.S. at 575.

In recent years, this Court has taken steps toward resolving that uncertainty, issuing opinions that are at odds with *Garcia*'s "political process" theory. *See Printz*, 117 S. Ct. 2365 (finding interim provisions of the Brady Handgun Violence Prevention Act unconstitutional as violative of the principle of dual sovereignty); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Article I of the Constitution did not empower Congress to abrogate the States' Eleventh Amendment immunity); *Lopez*, 514 U.S. 549 (holding that the Gun-Free School Zones Act of 1990 exceeded Congress's commerce clause authority); *New York*, 505 U.S. 144 (striking down as violative of the Tenth Amendment legislation compelling states to enact and enforce a federal regulatory program); and *Gregory*, 501 U.S. 452 (upholding state's requirement for mandatory retirement of judges against ADEA challenge, based on interpretation of ambiguous exemption).

In these cases, the Court has not relied upon *Garcia*'s *ipso facto* mechanism for determining whether a congressional enactment violates constitutional federalism. Rather, the Court has indicated that it will invalidate actions that "compromise the structural framework of dual sovereignty," whether caused by a law whose object is to "direct the functioning" of state governments, or a law of "general applicability" that, by "incidental application," excessively interferes with the functioning of States.[19] *See Printz*, 117 S. Ct. at 2383.

It is without question that the 1974 Amendments to the FLSA were enacted with the intent of directing the manner in which state and local governments perform certain fundamental functions. The Amendments displace state and local policies regarding the structure of government operations and the manner in which services are rendered, and displace state and local government control over the terms and conditions of employment of their employees. Further, Congress did more than simply apply the general provisions of the FLSA to state and local governments; it also included specific directives that expressly apply only to state and local governments. Under §7(k) and the implementing regulations, Congress has mandated the maximum hours for employees performing public safety functions, imposed different maximum hours standards depending on the type of emergency service rendered, and determined that an employee

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[19] As the Court noted in *Printz*, the law does not make a distinction between states and their political subdivisions for purposes of determining whether a governmental entity is protected by the Constitution's guarantees of federalism, including the Tenth Amendment; "the distinction is peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity." *Printz*, 117 S. Ct. at 2382.

no longer falls within the exemption if he spends more than a specified percentage of time on functions deemed "nonexempt." 29 C.F.R. §§553.200-553.233 (1997).

The FLSA also directs the States as to which persons they may permit to perform volunteer functions, 29 U.S.C. §203(e)(4)(A); 29 C.F.R. §§ 553.100-553.106, and which persons it may permit to work secondary employment. 29 U.S.C. §207(p); 29 C.F.R. §553.30. It dictates the circumstances under which a state may pay its employees compensatory time, the amount of hours of compensatory time that an employee may accrue, the rate at which compensatory time must be paid, and the amount that an employee shall be paid for accrued compensatory time upon termination of his employment. 29 U.S.C. §207(o); 29 C.F.R. §§553.20-553.28.[20]

Garcia brushed aside the Amendments' degree of interference with state sovereign functions, remarking that the interference was the same as that borne by private industry. The mandates at issue in the instant case, however, cannot be considered laws of general applicability that apply in the same manner to private industry; they are targeted directly at state and local public safety agencies and their specific functions. Moreover, the Constitution's structure is not premised on a division of power between private industry and the federal government, nor does it give private industry a sovereign role in the governing structure of this nation:

> As far as the Constitution is concerned, a State should not be equated with any private litigant. Instead, the autonomy of a State is an essential

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[20]The Act enforces compliance with a heavy hand, imposing criminal penalties of fines and imprisonment, in addition to civil damages, including liquidated damages and attorneys' fees. 29 U.S.C. §216.

> component of federalism. If state autonomy is ignored in asserting the means by which Congress regulates matters affecting commerce, then federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such a commerce power 'may well be neglible.'

Garcia, 469 U.S. at 588 (O'Connor, J., dissenting) (citation omitted) (quoting the *Garcia* majority opinion); cf. *Richardson v. McKnight,* 117 S. Ct. 2100 (1997) (explaining that different considerations applicable to government operations justify denial of 42 U.S.C. §1983 immunity to private prison guards).

Even if the Amendments were not so specifically directed to the States, they are invalid as applied to the County here because they excessively interfere with the structure of the County's Fire Department and its performance of critical public safety functions. *See Printz,* 117 S. Ct. at 2383. At the inception of County Charter government, the citizens of Anne Arundel County charged their Fire Department with the responsibility to provide emergency services, and the Fire Department has long carried out that mission through its cross-trained and dual-function firefighters, who work together on the same shift schedules, from the same fire houses that are spread throughout the County. The application of the FLSA, as interpreted by the lower courts in this case, will fundamentally alter the operational structure of the Fire Department and impair the County's ability to provide these essential services to its citizens.

Under our Constitutional scheme, the provision of public safety emergency services to citizens within the borders of the County should remain subject to local control:

> In *National League of Cities*, we spoke of fire prevention, police protection, sanitation, and public health as "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." Not only are these activities remote from any normal concept of interstate commerce, they are also activites that epitomize the concerns of local, democratic self-government. . . . In emphasizing the need to protect traditional governmental functions, we identified the kinds of activities engaged in by state and local governments that affect the everyday lives of citizens. These are services that people are in a position to understand and evaulate, and in a democracy, have the right to oversee. We recognized that "it is functions such as these which governments are created to provide . . ." and that the States and local governments are better able than the National Government to perform them.

Garcia, 469 U.S. at 575-76 (quoting *National League*, 425 U.S. at 851) (Justice Powell, with whom Chief Justice Burger, Justice Rehnquist, and Justice O'Connor joined, dissenting) (citations omitted).

The dissenting Justices in *Garcia* eloquently set forth their belief that "this Court will in time again assume its constitutional responsibility" to interpret and apply the structural protections of federalism. *Id.* at 589. Federalism and dual sovereignty have little meaning if the States are not permitted to decide the manner in which they will perform functions so decisively within their realm as local public safety emergency services. This case presents an opportunity for the Court to ensure that "the preservation of the States, and the maintenance of their governments [remain] as much within the design and

care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

CONCLUSION

For the foregoing reasons, the County respectfully requests that its Petition for Certiorari be granted.

Respectfully submitted,

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